

A Matter of Intent

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It's summer, I was travelling with my son in Northern Italy for a few days to feast our way through the *Osterie d'Italia* guide and back, which is why I skipped the editorial last week – please forgive me and consider the omission a heat-related advance on the upcoming summer break. In the meantime, there was no shortage of matters constitutional worth reporting and commenting on, and my thanks go to Anna von Notz, Evin Dalkilic and Sinthiou Buszewski, who have done a phenomenal job during my absence.

First of all: Poland. As expected, on Tuesday the ECJ [declared](#) the PiS government's attempt to neutralise the Supreme Court by means of forced retirement an [infringement](#) of its treaty obligations. The next strike followed swiftly by the hands of Advocate General Evgeni Tanchev whose [opinion](#), delivered on Thursday, deals with the National Judicial Council, the key to the capturing of the judiciary in general. The PiS majority had kicked out the sitting members of the Council before their constitutionally guaranteed term of office had expired and had amended the law to gain control of its membership. With its help, the PiS then installed a brand new Disciplinary Chamber at the Supreme Court and filled it with its minions. If now a judge seeks legal remedy against her harassment by the government, this is where her complaint will end up. That way, the PiS government makes sure that no independent judiciary will get into their way while they do away with the independent judiciary.

Before that, the Chamber of Labour Law and Social Security at the Supreme Court had been responsible for such complaints, which is not yet subjugated by PiS. It referred to the ECJ the question whether the installation of the PiS-controlled Disciplinary Chamber was compatible with the right to an independent court (Article 47 of the Charter of Fundamental Rights) and with the duty of the Member States to ensure effective judicial protection (Article 19(1) TEU). According to the answer proposed by the Advocate General, it was not: if the National Judicial Council is not independent, neither is the Disciplinary Chamber whose members it chooses. Therefore, the Polish law that declares it competent is inapplicable and the Chamber of Labour Law remains in charge.

The Advocate General does not waste time on the question if and to which extent the members of the National Judicial Council and the Disciplinary Chamber are actually and demonstrably dependent on PiS. It is the appearance of independence which matters for the public trust in the rule of law, and that arises from the political context of this whole so-called "judicial reform", the ultimate goal of which has been no secret: What PiS considers to be in need of reform about the Polish judiciary is its independence of PiS. That is what it wants to change. It is this context that matters, and not whether the new Polish judicial election procedure more or less resembles those in different member states and in different context.

Gerry's salamander

There are no United States of Europe, nor is there an EU Supreme Court. All the more spectacular is the contrast between the ECJ's fight against authoritarian populism on the one hand, and the US Supreme Court with its structural right-wing majority, cemented by Donald Trump and the Republicans in Congress, on the other.

On Thursday, the US Supreme Court handed down a [verdict](#) on the political manipulation of electoral district maps – a decision of unforeseeable consequences for the oldest constitutional democracy in the world.

++++A Note from the University of Speyer++++



The Chair for Public Law, German and European Administrative Law, of the German University of Administrative Sciences Speyer (Prof. Dr. Ulrich Stelkens)

announces a vacant full-time position as

Research Assistant m/f/d (Praedoc/Postdoc)

(salary group 13/14 TV-L) to work on the research project

„The development of pan-European general principles of good administration by the Council of Europe and their impact on the administrative law of its Member States”

funded by the German Research Foundation for two years. Further information [here](#).

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In the USA, the states are in charge of drawing electoral district maps. This gives the ruling party in the respective state the power to shift the balances in the national congressional elections to its own advantage and to the detriment of its competitors: it can tailor the constituencies so that the voters of the other party are either fragmented and divided between multiple districts until they are in the minority in each, or concentrated in specific districts which they win by a large margin but have no chance of winning any other ("cracking or packing"). With the means of modern digital polling tools, one can predict pretty accurately the electoral preferences on a

precinct or even street-block level. It just takes a couple of mouse clicks to draw a district map that produces fairly reliably the election outcome you wish for.

That's how these things are done nowadays, and nobody seems to be even much embarrassed about it. One of the cases decided by the Supreme Court was about North Carolina, where the Republicans in 2016 had a map drawn that was supposed to deliver ten Republicans and three Democrats for Congress. A Republican chairman of the districting committee said bluntly that he believed that electing Republicans was better than electing Democrats, so a map that favours Republicans was a service to the country. The other case is about Democrat-controlled Maryland, where in 2011 the goal was explicitly set and achieved to increase the ratio of Democrat to Republican districts from 6:2 to 7:1.

What does the Supreme Court have to say about this? Nothing. Except that it has nothing to say about it. According to Chief Justice Roberts and the other four conservatives on the bench, the decision about electoral district maps is a purely political one. It is beyond the scrutiny of the judiciary because there is no legal standard (except in cases of unequal voting weight or racial discrimination) to measure these matters by. The constitution expressly entrusts the legislative branch with the responsibility for the layout of the electoral districts and thus has nothing in principle to object if a political majority draws a map that helps its own interest. The problem, according to CJ Roberts, is not gerrymandering *per se*, but too much gerrymandering – and what exactly is too much is a question of fairness, not a question of law.

To come to this conclusion, you have to keep your eyes closed really, really tight, however. Gerrymandered district maps aren't just simply there all of a sudden. They are intentional political acts with a specific and explicit meaning, which is to predetermine the outcome of democratic elections: in North Carolina ten constituencies go to the Republicans and in Maryland seven to the Democrats, no matter how people vote. Gerrymanderers are people who want to decouple their own party's access to power from the shifting preferences of the electorate. What they do is the exact opposite of democracy, as the minority vote written by Elena Kagan denounces with an almost desperate clarity.

The cases decided by the Supreme Court are balanced: one with Republicans, one with Democrats as the bad guys. But that shouldn't deceive anyone. It is no coincidence that the five "conservatives" on the bench have once again come together for this vote. This judgement is part of a right-wing project.

America is changing, both culturally and demographically, and those who until recently were allowed to consider themselves "normal Americans" can no longer necessarily be certain to represent the American norm for much longer. Democracy can't be left to its own devices to reproduce "normal" majorities any more, so some amount of nudging is required, like voter ID laws, shady questions in the 2020 census (on which the Supreme Court gave another very interesting [verdict](#) on the same day) and other sorts of manipulation. And like everywhere where the populist right has come to power, constitutional jurisdiction is at the centre of the efforts. With Brett Kavanaugh taking the place of Anthony Kennedy, the US Supreme Court has

[become part](#) of the right-wing [project](#), not unlike the constitutional courts in Poland and Hungary. It is uncertain if it will ever be able to recover from that degradation. Or US democracy, for that matter.

Cracking nuts with a sledgehammer

There is a right-wing project and there is a right-wing extremist project, and to which extent both are aligned is a matter of dispute particularly in **Germany** these days: The fact that Germany has a problem with right-wing extremist terrorism should have been obvious to all non-comatose contemporaries for years, and yet an astonishing number of right-wing politicians act like the recent murder of the Kassel district commissioner Walter Lübcke by a neo-Nazi came as an utter surprise. [MAX PICHL](#) has some corrections to make about this point of view. The suggestion made by some in the CDU/CSU to beef up the militancy of German democracy by activating the so-far unused Article 18 of the Grundgesetz – forfeiture of fundamental rights – against neo-Nazis is deflated by [CHRISTOPH GUSY](#).

It is not so much neo-Nazis as IS fighters that the **German** Federal Government has in mind with its draft law on the loss of citizenship for terror fighters abroad. [KLAUS FERDINAND GÄRDITZ](#) and [ASTRID WALLRABENSTEIN](#) see an alarming tendency to misuse citizenship law to promote security and social policy aims. [DANIEL THYM](#) warns against exaggerations, while [ASTRID WALLRABENSTEIN](#) elaborates on her criticism.

Speaking of citizenship: [JACQUELYN VERALDI](#), [OSKAR GSTREIN](#) and [DIMITRY KOCHENOV](#) point to a rarely noticed connection, namely between naturalization and data protection. While originally the information about naturalization was supposed to be public, they now note and welcome a trend in the **EU** to treat these matters as confidential information.

In **France**, it has recently become a criminal offence to analyse the judgement behaviour of individual judges. Background: artificial intelligence could predict how certain judges would decide a case, and this could be exploited to increase the chances of success in court, especially in asylum law. [MALCOLM LANGFORD](#) and [MIKAEL RASK MADSEN](#) compare this law with the use of a sledgehammer to crack a nut and doubt that such an interference with freedom of expression can be justified under European Human Rights law.

In recent weeks, many **Twitter** users whose accounts have been blocked in a highly non-transparent manner have learned about the limits of their freedom of expression in the age of social media. Others, for their part, block critical followers themselves. Among them are high-ranking government members, which raises a number of fundamental rights issues investigated by [JÖRN REINHARDT](#).

The German capital **Berlin** wants to act against real estate speculation and help residents threatened by rising rents. Does Berlin have the necessary legislative powers to enact a rent cap? Does this infringe on the right to property? Could that ban work retroactively? [HEIKO SAUER](#) finds these questions difficult but solvable.

German Social Democracy is fighting for its survival not only in Berlin. Some SPD members are hoping for a boost by electing their future chairpersons by membership vote. Our own [ANNA VON NOTZ](#) considers this to be incompatible with German party law, which in her opinion should urgently be amended for that reason.

The European Court of Justice has declared the **German** car toll to be discriminatory and contrary to European law, which has surprised few outside the Bavarian governing party CSU which had championed this project against abundant warnings by EU law experts. [WALTHER MICHL](#) knows both the Bavarian way of doing things and EU law very closely and is all the more pleased about the crystal clear decision from Luxembourg. [ROBERT NESTLER](#) sees the CSU Federal Transport Ministers' "head through the wall" policy with respect to EU law as a pattern that can also be identified in migration policy.

The EU's attitude towards **Bulgaria**, where the independence of the judiciary is also acutely threatened, is nothing less than crystal clear. [RADOSVETA VASSILEVA](#) compares the Commission's approach to Alice staggering through Wonderland, "curiouser and curiouser". [SIMEON STOYCHEV](#) analyses the Bulgarian Minister of Justice's draft law and explains how the government tries to get the EU to end the unloved Cooperation and Verification Mechanism and still get away with all it wants.

In **Italy**, burdened by a heap of national debt, parliament considers experimenting with so-called mini-BOTs, a kind of substitute currency, to the great skepticism of the EU. [AGUSTÍN JOSÉ MENENDEZ](#), [MARCO GOLDONI](#) and [MARCO DANI](#) advise the EU to be more open to such unconventional ideas.

One European country about which I know far too little is **Moldova**. There, Constitutional Court performed a most astonishing stunt, first dissolving Parliament, rescinding the nomination of a new Head of Government and removing the President from office, only to repeal all of this a few days later. [GÁBOR ATTILA TÓTH](#) explains what is behind this.

Greece has violated the human rights of unaccompanied minor migrants in the infamous Idomeni border camp. This has been established by the European Court of Human Rights, and [DANA SCHMALZ](#) explains what this judgment is all about.

The rights of male chicks in **Germany**, thousands of whom keep being shredded right after hatching every day, remain controversial. [SASKIA STUCKI](#) and [CHRISTOPH WINTER](#) criticize the decision of the Federal Court of Justice on that gruesome practice.

The Treaty of Versailles is one of the founding documents of constitutional and international law that is celebrating a big-0 birthday this year. [INGO VENZKE](#) recalls that the International Labour Organization (ILO) has its origins in this treaty and finds much to be said for its emphasis on social justice.

In **Hong Kong**, a planned law to facilitate the extradition of suspects to mainland China has led to massive protests. [ALBERT CHEN](#) explains what this law is all

about. [CORA CHAN](#) sees this case as a turning point for the "one country, two systems" model of Hong Kong in China.

We are quite proud to host the online symposium organized by WESSEL REIJERS and LIAV ORGAD on the **Chinese** government's notorious plan for a social credit system. In the contributions of [WESSEL REIJERS](#), [JENS VAN'T KLOOSTER](#), [MATHIAS SIEMS](#) and [DAITHÍ MAC SÍTHIGH](#), [JOHN CHENEY-LIPPOLD](#), [JELENA DZANKIC](#), [CHRISTIE FORD](#), [ALBERTO ROMELE](#), [COSTICA DUMBRAVA](#), [JIAHONG CHEN](#), [PRIMAVERA DE FILIPPI](#), [MIRJAM MÜLLER](#), [JOSHUA FAIRFIELD](#), [FRANCESCA LAGIOIA](#) and [GIOVANNI SARTOR](#), [JEREMY DAUM](#) as well as [JONGXHI CHEN](#) leave no wish for informed opinions about this digital system of education of perfect citizens unsatisfied.

Elsewhere

[DANIEL SARMIENTO](#) points to a double-edged ruling of the **Spanish** Constitutional Court on the constitutional duty of courts to refer cases to the ECJ.

[PAOLO CAVALIERE](#) takes a closer look at the Advocate General's Opinion on **Facebook's** monitoring obligations.

[GABRIEL BEHAGHEL](#) and [ELSA DUCRUY](#) look at the structure of the **Iranian** constitution on the occasion of the resignation of the Iranian Foreign Minister and its non-acceptance by the state leader.

[ALAN RENWICK](#) finds the plans of the SNP government in **Scotland** to establish rules for referenda not so bad.

That's it for now. The global constitutionalism community is meeting these days at the ICON*S congress in Santiago, and I wish all who make it to Chile a lot of fun and interesting talks and fruitful conversations. Otherwise, enjoy the summer as much as heat and work and climate concern allow! All the best, and take care,

Max Steinbeis

